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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 JOSEPH P. CUVIELLO and DENIZ
19 BOLBOL, individually,

20 Plaintiffs,

21 v.

22 ROWELL RANCH RODEO, INC.;
23 HAYWARD AREA RECREATION AND
24 PARK DISTRICT; HAYWARD AREA
25 RECREATION AND PARK DISTRICT
26 PUBLIC SAFETY MANAGER/RANGER
27 KEVIN HART; ALAMEDA COUNTY
28 SHERIFF'S OFFICE; ALAMEDA COUNTY
DEPUTY SHERIFF JOSHUA MAYFIELD;
and DOES 1 and 2, in their individual and
official capacities, jointly and severally,

Defendants.

Case No. 3:23-cv-01652-VC

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
CROSS-MOTION OF DEFENDANTS
COUNTY OF ALAMEDA AND
DEPUTY SHERIFF JOSHUA
MAYFIELD FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

Judge: Hon. Vince Chhabria
Date: August 15, 2024
Time: 10:00 a.m.
Courtroom: 4 – 17th Floor

Action Filed: April 6, 2023
Trial Date: October 21, 2024

1 **I. INTRODUCTION**

2 The video evidence doesn't lie. It gives the viewer an objective view of exactly what took
 3 place at the rodeo on May 20, 2022, the only day at issue in Plaintiffs' claims against Defendants
 4 County of Alameda ("County") and Sheriff's Deputy Joshua Mayfield ("Mayfield"). The videos
 5 prove that Deputy Mayfield never ordered Plaintiffs to go to the Free Speech Area, never
 6 requested that they move there, and never threatened them with arrest if they did not go there.
 7 There was no effort or intent by Deputy Mayfield to threaten, intimidate, or coerce Plaintiffs and
 8 deny them their right to free speech. In their Opposition (Dkt. 118), Plaintiffs repeatedly and
 9 improperly try to impose liability on Deputy Mayfield based on statements made by Defendant
 10 Kevin Hart ("Hart") of the Hayward Area Recreation and Park District ("HARD"), rather than
 11 based on statements and actions by Deputy Mayfield. The reason for that effort is simple:
 12 Deputy Mayfield did nothing to interfere with Plaintiffs' rights. There was no conspiracy or
 13 acting "in concert," nor have Plaintiffs offered any admissible evidence to support their
 14 contention that there was an agreement among the Defendants to deprive them of their First
 15 Amendment Rights. Plaintiffs' arguments concerning the issue of the \$25,000 civil penalty,
 16 punitive damages and attorney's fees are similarly without merit, and Defendants County and
 17 Deputy Mayfield are entitled to entry of summary judgment.

18 **II. OBJECTIONS TO SAGE AND NEWKIRK DECLARATIONS**

19 Even though Plaintiffs relied on them in their motion for summary judgment (filed June 3,
 20 2024, Dkt. No. 84), they did not file the Declarations of Michael Sage ("Sage") and Robyn
 21 Newkirk ("Newkirk") until June 28, 2024 (Dkt. Nos. 113 and 114), which was one day *after*
 22 Defendants County and Deputy Mayfield were required to file their combined opposition to
 23 Plaintiffs' motion and Defendant's cross-motion—making it impossible for Defendants to
 24 consider and object to those declarations. Disregarding for the moment the fundamental
 25 unfairness of Plaintiffs' late filing of evidence on which they rely for their motion, a review of
 26 those two declarations shows they are rife with speculation, unfounded personal opinion,
 27 irrelevant information, and misstatements or mischaracterizations of the events at the rodeo on
 28 May 20, 2022, rather than actual admissible evidence of what transpired that day. The fact that

1 many of their assertions in those declarations are nearly identical further undermines their
 2 credibility and reliability. Defendants believe the declarants' misstatements as to what Deputy
 3 Mayfield said and did are readily apparent and handily refuted by a review of the many videos of
 4 the May 20 events submitted with Plaintiffs' motion and Defendants' opposition and cross-
 5 motion, and Defendants invite the Court to view all of the video footage submitted by the parties,
 6 to see exactly what happened that day.

7 For example, Newkirk says: "I understood that one Sheriff Deputy and . . . Hart . . . were
 8 working together" (Dkt. 113, p. 3: 9-11); "Based on Deputy Mayfield's discussion with Pat *it*
 9 *appeared we would be arrested*" (*id.* at lines 18-19 (emphasis added)); "it indicated to me that the
 10 threat of arrest was real" (*id.* at line 20); "It was clear to me that . . . Mayfield and HARD's Hart
 11 were trying to intimidate us because law enforcement officers tend to think they are the law" (*id.*
 12 at lines 24-25); and "Mayfield seemed like he had a personal vendetta against us, the protestors"
 13 (*id.* at line 26-27). These statements consist of impermissible opinion and conclusion; they lack
 14 foundation as there are no predicate facts stated showing a basis for the conclusions that the threat
 15 was "real," they were "trying to intimidate," "think they are the law," and "had a personal
 16 vendetta against us." In addition, such speculative opinions, including the declarant's speculative
 17 "understanding," are irrelevant. FRE 104, 401, 402, 601, 602, and 701-705. Similarly, Sage
 18 asserts: Mayfield and Hart "said a lot of things in an attempt to intimidate us," (Dkt. 114, p. 4:4);
 19 "we were in essence threatened with arrest if we did not move (*id.* at line 5); "seemed to be a
 20 police tactic" (*id.* at line 18); "I considered this to be a tactic of intimidation" (*id.* at line 19).

21 In addition, both Newkirk and Sage falsely state: "I heard Deputy Mayfield tell Pat he did
 22 not have to tell him if he would be arrested and that Pat needed to move." Newkirk Decl., (Dkt.
 23 113), p. 3, lines 17-18; Sage Decl. (Dkt. 114), p. 4, lines 3-4. The videos show that while Deputy
 24 Mayfield did say he did not have to tell Plaintiff Cuvillo if he would be arrested, he never said
 25 "that Pat needed to move" during that conversation. *See Scott v. Harris*, 550 U.S. 372, 380
 26 (2007) (where declarant's testimony is contradicted by the objective record, court should
 27 disregard on summary judgment).

28

1 **III. LEGAL DISCUSSION**

2 **A. Defendant Mayfield's Simply Stating That Something Could Possibly Happen**
 3 **In The Future If Plaintiff Broke The Law Is Not A Threat Of Arrest Within**
 4 **The Meaning Of California's Bane Act**

5 Plaintiffs have admitted in their Opposition that their entire case against Deputy Mayfield
 6 (and the County) depends on one single conversation between Plaintiff Joseph Cuvillo
 7 ("Cuvillo"), during which, in response to Cuvillo's insistent questions and demands that
 8 Deputy Mayfield answer, Deputy Mayfield said "you could be arrested for trespassing."
 9 Plaintiffs state that after that conversation, "Mayfield called his 'Sergeant On Duty;' and finally,
 10 (16) after Mayfield ended his call, there were no more threats of arrest for the rest of the
 11 evening." Opposition, p. 16:12-24. Plaintiffs acknowledge that Deputy Mayfield's statement
 12 was made in response to a question posed by Cuvillo. However, simply stating truthfully that
 13 there could be legal consequences for plaintiff if plaintiff broke the law, without more, cannot
 14 amount to a threat sufficient to support a Bane Act claim.

15 For example in *Camfield v. Board of Trustees of Redondo Beach Unified School District*,
 16 2016 WL 7046594 (C.D. Cal. December 2, 2016), plaintiffs alleged that defendants, a school
 17 principal and education director, violated the Bane Act by "threatening" plaintiffs that it was
 18 illegal to keep their daughter out of school and they would have to report plaintiffs to the
 19 authorities. *Id.* at *5-6. The District Court rejected that contention, concluding that the
 20 communications were not threats. "Defendants plainly and truthfully stated that there could be
 21 legal consequences if Plaintiffs did not bring their daughter to school. Accordingly, Defendants'
 22 conduct did not constitute threats or intimidation." *Id.* at *6.

23 Similarly, in *Constancia v. Los Angeles Unified School District*, 2018 WL 6137154 (C.D.
 24 Cal. September 17, 2018), a high school student was accused of harassing women and
 25 inappropriately touching at least one woman. The school authorities ask the student's parents to
 26 come to a meeting with school officials, including a school police officer. *Id.* at *3. During that
 27 meeting the vice principal told plaintiff and his mother about the allegations of sexual assault
 28 made by the female student, and explained the potential police consequences following the
 female student's complaint, including the possibility that the female student could file criminal

1 charges against plaintiff. *Id.* Following that meeting, plaintiff terminated his enrollment. He
 2 later brought an action against the school and its employees, including a claim for civil rights
 3 violations, contending that he withdrew from school under duress, characterizing defendants'
 4 statements as threats they would criminally prosecute him if he did not withdraw. *Id.* at *7. The
 5 court granted defendants summary judgment on constitutional claims, finding that defendants'
 6 statements did "not amount to an affirmative 'threat' of criminal prosecution made against
 7 Plaintiff—Defendants simply told Plaintiff that *maybe* he would go to jail for sexual assault if the
 8 victim decided to press charges." *Id.* at *8 (emphasis added by court). The court concluded that
 9 "[i]nforming Plaintiff of the potential consequences of his actions does not amount to threats of
 10 criminal prosecution." *Id.*

11 The same is true here. When Cuvillo turned to Deputy Mayfield and demanded to know
 12 whether he would arrest Plaintiff, Deputy Mayfield responded that he "could be arrested for
 13 trespassing." Deputy Mayfield made no other statements, other than to deny that he had an
 14 obligation to tell Cuvillo he was going to be arrested. Simply responding to the question posed
 15 by Cuvillo with a statement that he could be arrested if he broke the law, does not amount to a
 16 threat within the meaning of section 52.1. There is no meaningful distinction between the words
 17 "maybe" and "could be."

18 Plaintiffs attempt to meld portions of statements actually made by Deputy Mayfield with
 19 Plaintiffs' *argument* that Deputy Mayfield threatened to arrest them if they did not move to the
 20 Free Speech Area. When Plaintiffs purport to quote Deputy Mayfield in their Opposition, pay
 21 close attention to just where the quotation marks begin and end. For example, Plaintiffs argue
 22 that Mayfield "explicitly told Plaintiffs they, 'could be arrested for trespassing' if they did not
 23 relocate to the Free Speech Area." Opposition, p. 14:21-23. However, Mayfield never uttered
 24 the words "if they did not relocate to the Free Speech Area" or any statement like that. Plaintiffs
 25 made selective use of their quotation marks several times throughout their brief to make it appear
 26 that Deputy Mayfield said something he did not. There was no threat of arrest and no violation of
 27 the Bane Act by Deputy Mayfield.

28

B. Plaintiffs' Attempt To Impose Liability On The County And Deputy Mayfield Based On Plaintiffs' "Worked In Concert" Theory Fails

3 The videos do not support Plaintiffs' contention that Deputy Mayfield was working in
4 concert with Kevin Hart of HARD to violate Plaintiffs' rights under the Bane Act (Civil Code
5 section 52.1). Plaintiffs present no evidence of a "common goal of relocating Plaintiffs to the
6 Free Speech Area" that was agreed to by Deputy Mayfield and any of the other defendants. To
7 succeed on a conspiracy claim, Plaintiffs must establish facts concerning a specific agreement
8 between the parties, the scope of the conspiracy, the role each played, and when and how the
9 conspiracy operated. *Steshenko v. Gaynard*, 44 F.Supp.3d 941, 957 (N.D. Cal. 2014). The fact
10 that Deputy Mayfield was simply discussing the circumstances of the situation with one of the
11 adversarial parties (HARD or Rowell Ranch personnel) does not demonstrate that he was
12 "working in concert" with them. This is particularly true given the fact that Deputy Mayfield
13 expressly told Kevin Hart, Gary Hout and the others, that Plaintiffs had the right to protest at the
14 rodeo.

15 Furthermore, Deputy Mayfield's discussion of the situation was not limited to the other
16 defendants. The videos show that Deputy Mayfield also had discussions with the other
17 adversarial party, Plaintiff Cuvillo, regarding the situation, during which Deputy Mayfield
18 expressly acknowledged that Plaintiffs' free speech rights included the right to attempt to convey
19 their message to patrons attending the rodeo.

C. Plaintiffs Cannot Recover A \$25,000 Civil Penalty

21 It is especially telling that for all of Plaintiffs' arguments about how to define "damages"
22 and "penalties," and their lengthy discussion of legislative history, Plaintiffs were unable to cite
23 to even **one** case in which a private plaintiff bringing a claim for violation of rights under Civil
24 Code section 52.1 was awarded the \$25,000 penalty. Furthermore, they are asking this Court to
25 completely disregard what is "settled law" in this District. *See Cuvillo, et al. v. City of Oakland,*
26 *et al.*, 2010 WL 3063199 at *6 (N.D. Cal. Aug. 3, 2010); *Bolbol v. City of Daly City*, 754
27 F.Supp.2d 1095, 1117 (N.D. Cal. 2010); *Weaver v. City of Santa Clara*, 2014 WL 6330402 (N.D.
28 Cal. Nov. 14, 2014) ("it is settled in the Northern District that the reference to 'damages' (and not

1 ‘civil penalty’) in § 52.1(b) . . . eliminates the possibility of a \$25,000 penalty under §52(b)(2).”).
 2 And that settled law includes two cases in which Plaintiffs themselves were involved in where
 3 they were denied a civil penalty by the courts. The law has not changed since those earlier
 4 rejections, and there is no reason to diverge from the precedent set by the courts in the Northern
 5 District.

6 In fact, the first case that Plaintiffs cite and rely on, *Davis v. City of San Jose*, 69
 7 F.Supp.3d 1001 (N.D. Cal. 2014), expressly states that there are “no cases in which a court has
 8 awarded penalties under section 52(b) for Bane Act violations.” *Id.* at 1010. Although Plaintiffs
 9 try to rely on *Davis* as support for their contention that they may recover the \$25,000 civil penalty
 10 in this case, *Davis* does not reach that conclusion at all, since the Court there was not presented
 11 with, and did not decide, the issue of whether the reference to “damages” in Civil Code section
 12 52.1(c), includes a “civil penalty” under Civil Code section 52(b)(2). In *Davis*, the defendants
 13 argued on their motion to dismiss the complaint, that the plaintiff was not entitled to recover
 14 “damages” under section 52(b). All that the court decided in *Davis* was that since section 52.1
 15 did not specify that “recovery for violations of the Bane Act should be limited to any subsection
 16 of section 52” the plaintiff could “pursue damages under section 52(b).” *Id.* The court made no
 17 determination as to whether “damages” included a “civil penalty.”

18 When construing a state statute, federal courts apply state laws of statutory construction.
 19 *Bass v. City of Butte*, 458 F.3d 978, 981 (9th Cir. 2006). For interpretation of a statute, California
 20 law begins with the language of the statute itself, giving the words their usual, ordinary meaning.
 21 *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000. The courts also consider the maxim
 22 *expression unis est exclusion alterius*; that is, “[t]he express of some things in a statute
 23 necessarily means the exclusion of other things not expressed.” *Gikas v. Zolin* (1993) 6 Cal.4th
 24 841, 852.

25 California courts have long drawn a distinction between damages and civil penalties.
 26 “[A]n action to recover civil penalties ‘is fundamentally a law enforcement action designed to
 27 protect the public and not to benefit private parties’ (*People v. Pacific Land Research Co.* (1977)
 28 30 Cal.3d 10, 17” *Arias v. Superior Court*, 46 Cal.4th 969, 986 (2009). One of the

1 authorities cited by Plaintiffs expressly recognizes the distinction between damages and civil
 2 penalties. “[D]amages and civil penalties have different purposes Damages are intended to
 3 be compensatory, to make one whole. (See Civ. Code, §3281.) . . . On the other hand, ‘Civil
 4 penalties, like punitive damages, are intended to punish the wrongdoer and to deter future
 5 misconduct.”” *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 681 (2018).

6 That distinction is reflected in the language of Civil Code section 52.1, where the
 7 California Legislature expressly referred to a “civil penalty” in subsection (b), the provision under
 8 which the California Attorney General and any district or city attorney may bring a civil action,
 9 but it did not include “civil penalty” in subsection (c) under which a private party such as
 10 Plaintiffs here may bring an action. Rather, subsection (c) refers only to damages, injunctive
 11 relief and other equitable relief. The inclusion of “civil penalty” in subsection (b) and its
 12 omission in subsection (c) supports the conclusion that the Legislature intended that private
 13 parties not be entitled to recover a civil penalty. This is sometimes expressed more colloquially
 14 as the Legislature knows how to use a term when it wants to. In the case of the remedies
 15 available for a private action brought pursuant to Civil Code section 52.1(c), the Legislature
 16 specified that a plaintiff could recover “damages,” and certain other equitable relief. Unlike
 17 subsection (b), however, where a government attorney may seek civil penalties, a private party
 18 does not have that right under subsection (c). A review of the various iterations of Civil Code
 19 section 52.1 over time, confirms that the Legislature never conferred on a private party the right
 20 to seek civil penalties for a Bank Act violation. Construction of a statute is a judicial function,
 21 and a court is not bound by a legislative declaration as to the statute’s meaning. *Del Costello v.*
 22 *State of California*, 135 Cal.App.3d 887, 893 (1982); *Tyler v. California*, 134 Cal.App.3d 973,
 23 977 (1982).

24 **D. Plaintiffs Offer No Argument Or Legal Authority With Respect To Treble
 25 Damages And Have Therefore Waived The Point**

26 Plaintiffs’ Opposition does not discuss the issue of treble damages at all, and
 27 consequently, they have waived the point. *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir.
 28 2002). Defendants are entitled to summary judgment as to any claim for treble damages.

1 **E. Plaintiffs Have No Facts To Support Their Punitive Damages Claim**

2 Plaintiffs have tacitly conceded they cannot recover punitive damages against the County,
 3 since their argument on this point only discusses Deputy Mayfield. However, as to Deputy
 4 Mayfield, Plaintiffs have not offered any evidence (and merely conclusory argument) to support
 5 their contention that they are entitled to punitive damages. There is absolutely no evidence of
 6 malice, oppression or fraud, evil intent or motive, disregard of plaintiffs' safety, and/or reckless
 7 indifference to Plaintiffs' rights on the part of Deputy Mayfield; there was no physical harm to
 8 plaintiffs; and there was no misuse or abuse of power or authority. *See Cuijello, et al. v. City of*
 9 *Oakland, et al.*, Northern District of California Case No. C-06-5517 MHP (Dkt. No. 218) (July
 10 20, 2009).

11 **F. Plaintiff Cuijello Has Waived Any Claim For Attorney's Fees**

12 By way of a footnote in Plaintiffs' Opposition, Cuijello has admitted he is not seeking
 13 attorney's fees. Opposition, p. 6, n. 1. Having made this concession, Defendants are entitled to
 14 summary judgment on this issue against Plaintiff Cuijello. (Plaintiffs' Complaint includes a
 15 prayer for an award of attorney's fees, which is not limited to Plaintiff Bolbol.

16 **IV. CONCLUSION**

17 Defendants County and Deputy Mayfield respectfully request that this Court grant
 18 summary judgment to the County Defendants and deny Plaintiffs' motion for partial summary
 19 judgment as to the County Defendants.

20 Dated: August 1, 2024

FENNEMORE WENDEL

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By: /s/ Thiele R. Dunaway

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 County of Alameda and Alameda County
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